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STATE ACTION UNDER THE FEDERAL ESTATE TAX CREDIT CLAUSE

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In the spring of 1925 the Alabama Power Company proclaimed the opportunities of the state whose name it carries by a series of advertisements of this nature: "Who Gets Your Estate When You Die? That All Depends on Where You Live, What You Own and Where You Die. Taxation Figures of the H. C. Frick Estate as Published in the 'Nation's Business' are a striking example: Federal Tax, $6,338,898.68; Pennsylvania State Inheritance Tax, $3,167,197.87; Other Inheritance Taxes, $1,546,565.49. If the H. C. Frick estate had been in Alabama and the testator had been a resident of Alabama, his state inheritance tax would have been Nothing!" Another advertisement in the series thus explained to the prospective decedent this elysian state of affairs: "No Inheritance Tax Under Alabama Constitution. Not only has Alabama no Income nor Inheritance Tax but the framers of the Alabama Constitution have gone so far as to make sure that No Inheritance Tax Can Be Levied by the Alabama legislature on estates left to lineal descendants. Alabama Is the Only State of Industrial Vantage Which Has Neither Income Nor Inheritance Tax. Profits Made in Alabama Pass to Heirs!"[1]

In the fall of the preceding year Florida amended her constitution in order to prohibit the taxation of inheritances and the taxation of incomes of residents of that state.[2] Florida had never had either an inheritance tax or an income tax. Also it has been said that under her then existing constitution Florida could not have an inheritance tax and that this

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[1] So. TEX BULL., March 26, April 6, April 30, 1925. The advertisement in the issue of April 16 asked the question: "Shall the reward of industry and thrift be taken from those who have built the Industries and Commerce of the country—after they die—by the tax upon inheritance?" and the advertisement answered: "Not in Alabama!" The Alabama constitution of 1901, art. XI, §219, authorized the legislature to impose a tax of not more than two and one-half per centum of the value of estates transferred to persons "other than to or for the use of the father, mother, husband, wife, brothers, sisters, children, or lineal descendants of the grantor, devisor, donor, or intestate." The constitution was amended in 1931, as indicated in this article, in order to take advantage of the federal credit.

[2] The amendment, which was adopted at the general election in 1924, provided: "No tax upon inheritances or upon the income of residents or citizens of this state shall be levied by the State of Florida, or under its authority, and there shall be exempt from taxation to the head of a family residing in this state, household goods and personal effects to the value of five hundred dollars." FLA. CONST. art. IX, §11.

amendment was but a reiteration of the state's fundamental law.[3] Such an amendment with its necessarily attendant publicity appeared to be an advertisement that Florida would be a permanent refuge from inheritance taxation. The legislature of Nevada in February 1925 followed up this procedure by repealing that state's inheritance tax act of twelve years' standing.[4]

Into this movement came a clause of the federal estate tax which has resulted in the abolition of inheritance tax havens. A consideration of this device as an agency in the elimination of interstate tax competition is the purpose of this article.

Under the Revenue Act of 1921 the federal estate tax was graduated from a rate of one per cent on the first fifty thousand dollars to a maximum of twenty-five per cent on the excess over ten million.[5] The bill reported by the Ways and Means Committee in 1924 carried these same rates. However, during the consideration of this bill Congressman Ramseyer of Iowa offered an amendment which would sharply increase the rates in the higher brackets and reach a maximum of forty per cent.[6] Opponents of the higher rates became defenders of the states' taxing preserves. It was argued that the field of death taxes belonged preeminently to the states, had been occupied by the federal government only in emergencies, and that to increase these rates in a period of tax reduction would be a declaration of permanent occupancy.[7] The advo-

[3] Statement of Mr. W. E. Kay representing the Governor of Florida. Mr. Kay relied upon a statement of the Florida Supreme Court to the effect that under the Florida constitution only two classes of taxes could be levied, property taxes and licenses. See Afro-American Industrial and Benefit Ass'n. v. State, 61 Fla. 85, 54 So. 383 (1911); *Hearings on Revenue Revision, 1927-28, Committee on Ways and Means,* 629, 630.

Mr. E. Amos of Florida made this statement at the Preliminary Conference on Inheritance and Estate Taxation held in 1924 by the National Tax Association: "We have a great many people who come down there and invest in property. It has been pointed out that we have no such taxes as these (inheritance or estate taxes), which have been especially emphasized in the last few years, and they said to us, 'If you could only guarantee us that this situation will continue, we should feel more like coming down here and investing our money.' So under that idea we have made a guarantee that we would continue the present status." 17 PROC. NAT. TAX ASS'N (1924) 88.

[4] NEV. STAT. 1925, c. 27. "There was quite an agitation last winter in many of the states in favor of following the example of Florida and repealing their state inheritance taxes. One state, Nevada, did repeal its tax. The matter was agitated in California and a bill was introduced in the Legislature of Ohio to have the tax repealed. It was also considered in Colorado. . . ." Statement of E. D. Chassell, representing Mortgage Investment Bankers Ass'n. of America. *Hearings on Revenue Revision* (1925) *Committee on Ways and Means,* 440.

[5] 42 STAT. 277 (1921).

[6] 65 CONG. REC. 3101 (1924).

[7] Mr. Mills of New York: "Here is a time when there is a surplus in the Treasury. Here is a time when the emergency is over. What reason, in the name of Heaven, is there for raising inheritance tax rates at this time, unless you mean to make a solemn declaration that it is our purpose for all time to make this a part of the federal system of taxation and to deprive the states of it?" 65 CONG. REC. 3104 (1924).

cates of higher death taxes likewise feared that increased federal rates might embarrass the states by decreasing the amount which the states could exact, and would heighten state competition for the wealthy. These advocates proposed a novel arrangement to protect the states and to promote uniformity in the size of state inheritance tax rates. Congressman Green, of Iowa, Chairman of the Ways and Means Committee, was the author of this device.[8] It was introduced on the floor of the House by Congressman Frear of Wisconsin as an amendment to the amendment offered by Congressman Ramseyer.[9] The amendment provided that:

"The tax imposed by this section (the federal estate tax) shall be credited with the amount of any estate, inheritance, legacy or succession taxes paid any state, territory, or the District of Columbia with respect to any property included in the gross estate. The credit allowed by this subdivision shall not exceed 25 per cent of the tax imposed by this section."[10]

With but little discussion the House adopted the amendment *viva voce,* and, without discussion at all on the floor of the Senate, it became part of the Revenue Act of 1924. At that time the movement threatening the elimination of state inheritance taxation was not in full swing, and the primary reason for the creation of the twenty-five per cent credit appears to have been the desire to protect state revenues in the face of the increased federal rates. It was not until 1926, when the credit had been increased from twenty-five to eighty per cent, that the clause fully assumed its rôle of protector against interstate competition.

In his annual report for 1924, the Secretary of the Treasury, Mr. Mellon, questioned whether the field of death taxes should be utilized by the states or by the nation or whether the field was open to both.[11]

[8] Statement of Dr. E. R. A. Seligman, referring to the credit device: "There you have the avenue of escape, which is the ingenious method devised by your Honorable Chairman (Mr. Green). I think it sprang from his fertile brain as Minerva did from the head of Jove. I do not remember having seen it before. . . ." *Hearings on Revenue Revision* (1925) *Committee on Ways and Means,* 491.

[9] 65 CONG. REC. 3114 (1924). Mr. Green of Iowa: "All inheritance or estate taxes fixed by the state must inevitably prove a failure for the reason that all a man has to do to get away from such taxes is to move into another state that does not impose estate taxes, and take his residence there. On the other hand, the federal government ought not to take away from the states all the power in effect to levy and receive inheritance taxes and with this amendment which will soon be offered the states would be actually assisted by the amendment as amended in the collection of inheritance taxes, instead of being defeated in the collection thereof . . . I favor the amendment that is to be offered, and I will be for this amendment (Ramseyer) if it is amended in that manner (Frear). Otherwise, I would be obliged to vote against it because I could not vote for an amendment which would practically destroy the power of the several states to levy inheritance taxes."

[10] 43 STAT. 303 (1924).

[11] REP. SEC. TREAS. (1924) 11; *id.* (1925) 351; *id.* (1927) 51.

President Coolidge expressed himself as in sympathy with federal retirement from this form of taxation.[12] The governors of thirty-two states endorsed a resolution urging that the federal tax be repealed and that the field be left to the states for such individual action as they might see fit.[13] This was the situation confronting the Ways and Means Committee when it assembled for hearings on revenue revision in the fall of 1925.

Secretary Mellon now appeared before the committee and recommended that the estate tax be repealed. The reasons for this position were, he stated, that the right of inheritance is controlled by the states and not by the federal government, and for that reason the states could more properly exact a tax on the privilege of transmitting property at death; that the estate tax had been and should be used by the federal government only in times of emergency; that state taxes were increasing, whereas federal taxes were being reduced, and that the federal government could get along without this source of revenue and leave it to the states.[14] Six governors appeared before the committee in order to urge repeal, but, under questioning from members of the committee, the governors agreed that it was a vicious practice for the states to use tax exemptions in order to attract capital, and that if it were possible for the federal authority to eliminate this competition among the states in inheritance taxation such an arrangement would be desirable. "This thing of the states bidding against each other for citizenship is absolutely disastrous," said Governor Trinkle of Virginia. "The State of Florida . . . may be in a position to do without the inheritance tax and the income tax because they may have a different plan of taxation. . . . If you were to wipe out in the State of Virginia the inheritance tax and the income tax you would put us in bankruptcy." . . . "I think that if the federal inheritance tax were absolutely repealed," said Congressman Green to Governor Trinkle, "many wealthy citizens of your state—and there are many of them—would take up a nominal residence in Florida, and you would not only lose the inheritance tax but the income tax. You could not enforce either one against them." And Governor Trinkle agreed. Congressman Garner then said, "There is no other power that could reach Florida in this situation except that

[12] (1924) 9 BULL. NAT. TAX. ASS'N. 268; (1925) 10 *id.* at 169; 67 CONG. REC. 3678 (1926).

[13] Governor Walker of Georgia presented to the Ways and Means Committee the resolution which was adopted at a conference in Savannah in June, 1925. He informed the Committee that four governors favored the federal tax: Pierce of Oregon, Blaine of Wisconsin, Hamill of Iowa, and Richardson of California. *Hearings on Revenue Revision* (1925) *Committee on Ways and Means,* at 336; *Hearings on Revenue Act* (1926) *Senate Finance Committee,* at 55.

[14] *Hearings on Revenue Revision, op. cit. supra* note 13, at 6.

of the federal government?" . . . "None that I know of," replied the Governor.[15] Mr. Garner asked Governor McLean of North Carolina, "If we gave a citizen of your state the right to deduct from his federal estate tax all the taxes he paid in the State of North Carolina, then you could not be heard to complain?"—"No," said Governor McLean, "because the thing that we are after principally is the revenue."[16]

A conference had been held in Washington in February 1925 under the auspices of the National Tax Association and resulted in the naming of the National Committee on Inheritance Taxation to investigate this subject and report back to a subsequent conference. The committee, which was headed by Mr. Frederic A. Delano, worked on the subject for six months and recommended that the credit provision of the estate tax be increased from the existing twenty-five per cent to eighty per cent, and that legislation be enacted by the next session of Congress providing for the repeal of the estate tax to take effect six years from that time. It was believed that in this six year period substantial uniformity in state death taxation might be achieved.[17]

Members of the Ways and Means Committee were of the opinion that death taxes should be utilized in this country and that if the states were capable of developing this tax it would be well to leave at least the larger share to them, since they were the more in need of the money; but the credit provision seemed the only way of assuring that the field would be occupied by the states.[18] Thus the recommendation of the Delano report—that the credit be increased to eighty per cent—met with the committee's approval. But, rather than to make provision for repeal of the tax at the end of six years, the committee's attitude appeared to be that it would be better to wait and see what the states would do toward securing uniformity.[19]

The bill which the committee reported carried provision for the in-

[15] *Id.* at 353.

[16] *Id.* at 362; 67 CONG. REC. 703 (1925).

[17] REPORT OF THE NATIONAL COMMITTEE ON INHERITANCE TAXATION (1925); PROCEEDINGS SECOND NATIONAL CONFERENCE ON INHERITANCE AND ESTATE TAXATION (1925); statement of Frederic A. Delano, *Hearings on Revenue Revision* (1925) *Committee on Ways and Means,* at 389; statement of Mark Graves, *id.* at 384, 387.

[18] 67 CONG. REC. 719 (1925).

[19] 67 CONG. REC. 522 (1925); see statement of Dr. Thomas S. Adams, *Hearings op. cit. supra* note 17, at 461, "I indorse it (the Delano report); I think, with the exception of one provision and that is that you should repeal the tax now to take effect six years later. I should like to see the substance of the Delano report adopted without a provision for repeal, and then wait and see what happens. So far as I know it, the position of Judge Hull (of the Ways and Means Committee) on this subject is precisely my own position. I think that we ought to get from death dues in this country more than we get at present. I think that we should raise from this source enough revenue to measurably relieve the farmers and the general taxpayers."

crease of the credit to eighty per cent. Opposition to the credit was of two kinds. Spokesmen for Florida deplored the "coercion of sovereign states," and naturally the credit clause became "the most dangerous precedent which has ever been offered by . . . Congress in the history of time."[20] Such was the opposition from the state whose activity had contributed largely to the extension of the credit. A very different type came from another quarter. Several Congressmen from the West pointed out that probably most fortunes are the product of interstate activity, the result of contributions from the nation as a whole, and for this reason the estate tax should be retained by the federal government and expended for national purposes.[21] State jurisdiction to tax is not always even roughly related to state contribution to the creation of wealth. The state of domicile has power to tax intangible wealth which may have been derived entirely from activity in another state or from a group of states. Yet under the proposed credit the federal government would relinquish all but twenty per cent of the federal tax to those states so fortunate as to possess the criteria of jurisdiction. The credit provision, however, had the strong support of both Republican and Democratic leaders of the Ways and Means Committee, and efforts to remove this provision failed.

When the bill went to the Senate, the Finance Committee reported an amendment striking out the estate tax entirely.[22] Discussion in this branch of Congress largely centered upon the credit provision of the House bill. The objections that the credit violated the constitutional requirement of geographical uniformity, coerced sovereign states, and was a vicious precedent were again voiced, and here at more

[20] 67 CONG. REC. 676, 959, 960, 962 (1925).

[21] Mr. Ramseyer of Iowa: "I will tell you frankly, from a broad national viewpoint, I am not satisfied with the 80 per cent credit provision in this bill. I think it is illogical. A state like New York will get a credit with this 80 per cent provision on estates that is out of proportion to either the basic wealth of the state or the population of the state. . . ." 67 CONG. REC. 708 (1925); Mr. Simmons of Nebraska: "The great estates of America are now largely in personal and intangible property. They are accumulated from business not conducted in one state but throughout the United States. They are successful because of the patronage of the American people and because of the security afforded by the federal government. Gathered as they are, from the entire United States, it would seem that the benefit of any tax upon the transfer at death should go to the entire population and not to the population of any one state, where the holder claimed a residence at the date of death. It so happens that the great fortunes affected by the present inheritance tax are largely centered in a few states. . . . In my judgment, the entire inheritance tax levied against estates covered by the present law should be paid into the federal treasury and be used for federal expenses. It will thereby inure to the benefit of the entire people of the nation from whom it was in the first instance derived. Every state will then get its fair share." 67 *id.* 712. See *Hearings, op. cit. supra* note 17, at 463, 492.

[22] 67 CONG. REC. 3595 (1926). Senator King reported that all members of the Senate Finance Committee, except himself, favored abolition of the federal estate tax. *Id.* at 3607.

length.[23] The amendment striking out the estate tax passed, and the bill went to conference. It appears that the House conferees were adamant for the estate tax and the credit clause; in effect they said that, if those provisions did not go in, there would be no bill at all.[24] As a result, the estate tax with the eighty per cent credit was restored to the bill, and the conference report was agreed to by both branches.

What has been the effect of this innovation in federal taxation, and how have the states reacted to it? What changes were caused, first by the twenty-five per cent credit, and later by the eighty per cent clause? What place in our constitutional system has this instrument for inducing state action? Efforts to finance state government are thwarted by the old and wearisome threat that mobile taxpayers will move to commonwealths where, for good reason or bad, the tax rates are at least

[23] Senator Caraway: ". . . I think that of all the vicious legislation that has been before Congress since I have been a member that is the most vicious. It is without any defense, as I see it. If the federal government could coerce a state by levying an estate tax, it could make it do anything else. The state would become a creature absolutely subservient to the federal government, . . ." *Id.* at 3608. Senator Bruce: "A sovereign state of the Union, the State of Florida, which has never had an estate or an inheritance tax, or an income tax, has seen fit, in the exercise of its own ideas of state policy, to adopt constitutional provisions prohibiting state estate or inheritance taxation, or state income taxation. Did she not have the right to do that if she saw fit to do it? If her condiion was so fortunate that she could dispense with estate or inheritance or income taxation, is that any reason why the federal government should endeavor, in the cunning manner evidenced by the House provisions of the pending bill, to deprive her of her autonomy?" *Id.* at 3620. Senator Fletcher: "The uniformity clause was intended to prevent sectionalism in the exercise of the taxing power. Here we have the very worst type of sectionalism—a sectionalism aimed at a sovereign state and a tax law designedly framed to operate differently within the bounds of three states of the Union from the way in which it operates in the other forty-five." *Id.* at 3599.

The estate tax of 1924 contained the "objectionable" principle of the credit in the twenty-five per cent clause, but this passed the Senate without discussion of the credit. Mr. Garner reported this conversation with a Senator from North Carolina: "Here is North Carolina. Every member of the House of Representatives from North Carolina, as I recall voted for the inheritance tax. Every member of the delegation from North Carolina in 1924, including the other body, voted for the inheritance tax, and also voted for it in 1916. One of them told me, 'Oh, I did not vote for it in 1916.' I said, 'Why here is the Record that shows you voted for it.' 'Well,' he said, 'that was in time of war.' 'Why,' I said, 'my dear Senator, I understand the Democrats won the 1916 campaign on the slogan, 'He kept us out of war. War in the East, peace in the West. Thank God for Woodrow Wilson.' That was our slogan. We passed the 1916 act before the election of 1916, and he voted for it, although he said he never voted for it in time of peace. He said that now he could not support it because it had the deduction feature in it. 'Why,' I said, 'Senator, you supported one in 1924.' He said, 'Oh, no; there was not anything of that kind in the 1924 act.' I said, 'There was a twenty-five per cent deduction.' He said, 'Do you know, I did not know that.'" *Id.* at 4423.

[24] Mr. Garner reported to the House this action of its conferees: "We finally set the hand down and said—and I think I made the statement—'Gentlemen, there are 205 amendments in the bill; you can yield on 204 and then leave the estate tax for us to yield on, but in such case there will never be a bill, because we are going to have that estate tax in the law or this bill will never become a law .'' *Id.* at 4425; also see, *id.* at 4478.

temporarily lower.[25] Can the credit device be used to advantage in the elimination of interstate competition in other fields of taxation? These are the questions to be considered here.

The dominant purpose in the enactment of the twenty-five per cent credit was to enable the states to share in death taxation, while, at the same time, Congress assured that this form of taxation would contribute more to the expense of government than it previously had. If the states could raise their rates the objective of a greater contribution from death taxes might be achieved without increased federal rates. But uncoerced uniform state action is always difficult, and it is practically impossible when a premium goes with non-conformity. Still, if the federal rates were increased, the combined amount of federal and state taxes might in some states be enough to induce part of the wealthy to lighten the impending burden by selecting more advantageous domiciles. Thus it was feared that increased federal rates might be detrimental to the states, and, to guard against this, the palliative of the twenty-five per cent credit was proposed. Under this provision an estate would receive a credit against the tax due the federal government for death taxes paid to any state, but this credit could not be in excess of twenty-five per cent of the federal tax. So, in order for a state to receive the full benefit of this credit, it was of course necessary that its death rates be not less than twenty-five per cent of the federal rates.

At the time of this enactment, state inheritance tax rates were of a multifarious nature. Although most of the statutes were essentially alike in structure and scope, decades of legislative changes in rates and exemptions produced a heterogeneity which makes generalization difficult. In most of the states the rates depended on the relationship between the deceased and the person receiving, and also were graduated, with many variations, according to the amounts received. Although the federal rates were increased in 1924, it appears that the state rates on

[25] Although reported as not involving a threat, witness the account of Mr. S. Clay Williams' appearance, in behalf of the R. J. Reynolds Tobacco Company, before the joint finance committee of the North Carolina General Assembly of 1933. Mr. Williams "pointed out that those managing the tobacco companies and other large enterprises did not own them and said that he would not know how to answer if forced to tell stockholders his company was remaining in North Carolina when it would be cheaper to go somewhere else and operate. 'Do not put any of us managing North Carolina companies, who want to stay here and are determined to stay here in any such position as that,' he urged. Mr. Williams declared that because in the past North Carolina had adopted a 'reasonable and conservative attitude toward business' the R. J. Reynolds Tobacco Company had concentrated its activities in North Carolina, although the process involved dismantling valuable plants in other states. . . . He reminded the committee that North Carolina grew industrially when the tax situation was favorable but that in 1927, the cotton mills moved from New England south and flew over North Carolina into more favorable territory." *The Raleigh News and Observer*, Jan. 24, 1933.

the smaller successions were generally as much or more than the federal rates on estates of corresponding size.[26] But, whereas the state rates tended to reach a maximum at five hundred thousand or one million, with the highest rate applying to all successions over that amount, the federal rates were more extensively graduated and the rates applicable to the larger estates were much higher than the state rates on large successions.[27] It seems that most of the states, without change in their rate structures, would be in a position to benefit from the twenty-five per cent credit in the case of the smaller estates, but, due to the fact that in many states the rate progressions stopped short of the high federal rates applicable to the larger estates, the rates of a number of states would not fully absorb the federal credit on large estates, and especially would this be true if the estate were left to direct heirs. What action did the states take to receive a larger benefit of the credit?

The first steps were taken by New York, Pennsylvania and Georgia in 1925. New York passed an estate tax which applied to estates of residents in excess of one million dollars and with rates exactly one-fourth of the federal rates.[28] This change enabled New York to absorb the federal credit on the larger estates, and the New York inheritance tax, which remained in effect, appears to have been sufficiently high to absorb the credit for smaller successions. Pennsylvania also adopted an estate tax, but with the simple specification that the tax should be equal to twenty-five per cent of the federal tax where this twenty-five per cent was as much or more than the existing Pennsylvania inheritance tax; otherwise the inheritance tax rates should apply.[29] Georgia pro-

[26] For example, the federal tax in 1924 on an estate of $100,000 ($50,000 exempt) would have been—one per cent—$500, while the North Carolina tax, if the estate went to a son or daughter, would have been $1,650; New York, $1,650; and Virginia, $1,400. See 43 STAT. 303 (1924); N. C. Pub. Laws 1923, c. 4, §6; N. Y. CONSOL. LAWS (Cahill, 1923) c. 61, §221-a; VA. CODE. ANN. (Michie, 1924) Tax Bill §44.

[27] Examples of state rates reaching an early maximum: Connecticut, Delaware and New York, four per cent on all over $200,000; Iowa, seven per cent on all over $300,000; North Carolina, five per cent on all over $500,000; Massachusetts, six per cent on all over $1,000,000. These rates apply to shares going to direct heirs. For others the rates are higher but the maximum is reached at the same points. Conn. Laws 1923, c. 190; Del. Laws 1917, c, 7; N. Y. CONSOL. LAWS (Cahill, 1923) c. 61, §221-a; IOWA CODE (1927) §7313; N. C. Pub. Laws 1923, c. 4, §6; Mass. Gen. Laws 1921, c. 65. The federal rates under the 1924 law were graduated up to forty per cent which applied to the amount of the net estate in excess of ten million. 43 STAT. 303 (1924).

[28] N. Y. Laws 1925, c. 320. This tax applied to estates of residents. It was provided that the estate tax should be credited with death taxes paid to other states and taxes imposed by the New York inheritance tax act. See also, N. Y. CONSOL. LAWS (Cahill, 1923) c. 61, §220.

[29] Pa. Laws 1925, act no. 416. "All taxes imposed by this act shall be imposed upon the clear value of the property subject to the tax and shall in each estate be equal to twenty-five per centum of the estate tax imposed upon the net estate of such decedent under the provisions of section three hundred and one of the Revenue Act of 1924 of the United States, but if said section of the Revenue

vided that the only death tax which should be paid by estates of residents should be an estate tax equal to twenty-five per cent of federal estate tax, and with that stroke diminished the death tax advantages of her neighbors, Florida and Alabama.[30]

The next year the credit was increased to eighty per cent,[31] and in the two succeeding years seventeen states took action to secure its benefit.[32] The number has increased gradually so that now thirty-six states have acted.[33] Although there are variations in phraseology, half of the states can be grouped together under statutes which, in addition to their regular inheritance taxes, impose estate taxes on the estates of resident decedents. The amount of such estate tax is the difference between the possible federal credit—eighty per cent of the federal tax—and the aggregate of all inheritance taxes paid to the domiciliary state and to other states.[34] A slightly different approach utilized in a few states is the imposition of an estate tax equal to eighty per cent of the federal tax, with provision for a credit against the state tax for all other inheritance taxes.[35] Another group of states impose the addi-

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Act is repealed or if no tax is imposed on such estate by said section of said act or if twenty-five per cent of the tax imposed by said section amounts to less than the following rates, then in either event the taxes imposed by this act shall be at the rate of two per cent upon property passing to direct heirs and at the rate of ten per cent upon property passing to others."

[30] Ga. Laws 1925, 63.

[31] 44 STAT. 70 (1926), 26 U. S. C. A. §1093 (1926). The changes in the clause were the substitution of "80 per centum" for "25 per centum," and the addition of a limitation so that the credit "shall include only such taxes as were actually paid and credit therefor claimed within three years after the filing of the return required by section 303." For remainder of the credit clause see foregoing part of this article.

[32] 1926: Mass., R. I., Va., Ga., N. Y., Ky. and N. J. increased their inheritance tax rates apparently to take advantage of the credit. 1927: Calif., Colo., Del., Me., Mo., Mont., N. C., Ohio, Pa., Vt.

[33] 1928: Miss. 1929: Iowa, Md., Mich., Neb., Tenn.; 1930: Kan.; 1931: Conn., Fla., Ind., Minn., N. H., Wash., Wis.; 1932: Ala., La.; 1933: Okla., Tex., W. Va.

[34] The Connecticut statute: "A tax is imposed upon the transfer of the estate of each person who at the time of death was a resident of this state, the amount of which shall be the amount by which eighty per centum of the estate tax payable to the United States under the provisions of the federal revenue act in force at the date of such decedent's death shall exceed the aggregate amount of all estate, inheritance, legacy transfer and succession taxes actually paid to the several states and territories of the United States, including this state, in respect to any property owned by such decedent or subject to such taxes as a part of or in connection with his estate." Conn. Pub. Acts 1931, c. 77a. See, Del. Laws 1927, c. 8; Del. Laws 1933, c. 8; Ind. Acts 1931, c. 77a; Me. Laws 1927, c. 116; Me. Laws 1933, c. 148, §36; MD. CODE (Bagby, Supp. 1929) art. 62-A; Mich. Acts 1929, no. 237; Minn. Laws 1931, c. 332; Mont. Laws, Ex. Sess. 1933-34, c. 48, §3a; Mont. Laws 1927, c. 141; N. H. Laws 1931, c. 72-A; NEB. COMP. STAT. (1929) c. 77, §2301; TENN. CODE (1932) §1296; Vt. Laws 1927, no. 23; WIS. STAT. 1931, §72.50.

[35] Ohio: "In addition to the tax levied under section 5332 of the General Code of Ohio, there is hereby levied an additional tax upon the transfer at death of the estates of resident decedents of an amount equal to eighty per centum of the tax imposed by title III of the act of congress, approved Feb. 26, 1926, known as the 'Revenue Act of 1926,' the rates contained in said act of congress being as

tional estate tax on estates both of residents and non-residents, the amount of the tax being the difference between the inheritance tax due the particular state and eighty per cent of the federal tax due on the portion of the estate within the jurisdiction.[36] Although the large majority of the states have both inheritance and estate taxes, New York and Mississippi have substituted the estate tax as the only death tax, and provide schedules of rates which absorb the federal credit.[37]

It would seem that a statute designed to obtain the full benefit of the federal generosity would impose on any estate within the jurisdiction a tax sufficient to equal eighty per cent of the federal tax on that property, considering the property as a part of the total estate. This could be arrived at by computing the federal tax on the entire

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follows, . . . "The tax imposed on any estate . . . shall be credited with the amount of . . . any estate, inheritance, legacy or succession taxes actually paid to any state or territory of the United States . . . in respect of any property included in the gross estate. . . ." Ohio Laws 1927, 421. See, FLA. COMP. LAWS (Supp. 1934) §1342(2), applies to estates of residents and non-residents; GA. CODE (Supp. 1928) §1041(1), no provision for crediting taxes paid other states; Colo. Laws 1927, c. 114, §4; Colo. Laws 1933, c. 106, §4.

[36] Texas: "In addition to the inheritance tax already levied by this state under existing laws, an inheritance and transfer tax is hereby levied upon the net estate of every decedent dying after this Act shall take effect, and whose estate or any portion thereof is, or hereafter shall be, made taxable under the inheritance tax laws of this state. . . . Said tax shall be, and is, levied upon the entire net value of the taxable estate of the decedent situated and taxable in the state of Texas, and the tax on each such estate shall be equal to the difference between the sum of such taxes due this state as inheritance or transfer taxes and eighty per cent of the total sum of the estate and transfer taxes imposed on such estate by the United States Government under the Revenue Act of 1926, by reason of the property of such estate which is situated in this state and taxable under the laws of this state.

"In determining what is eighty per cent of the United States tax mentioned in the preceding sections, the same shall be computed as eighty per cent of such taxes actually assessed and determined by the federal government under the Revenue Act of 1926, against every estate situated wholly in this state, or in case an estate is situated partly in this state and partly outside of this state, then such eighty per cent shall be computed as eighty per cent of the total amount of federal taxes . . . on . . . that part of the estate situated in the State of Texas, and the said amount of federal taxes shall be determined by multiplying the total federal estate tax on the entire estate by a percentage which shall be the same percentage as the percentage of the net estate located in Texas is to the total net estate of the decedent, wherever located, before deducting specific exemptions. . . ." Tex. Gen. Laws 1933, c. 192, §26. See also, IOWA CODE (1931) c. 351-C1; Mass. Acts 1927, c. 178, as amended by Mass. Acts 1932, c. 284; N. C. CODE ANN. (Michie, Supp. 1933) §7880(6); PA. STAT. ANN. (Purdon, 1931) tit. 72, §2303; R. I. Acts 1929, 188; W. Va. Acts 1933, c. 36; CAL. STAT. 1927, c. 646, §2 3/4; KAN. STAT. (Supp. 1933) c. 79, art. 15; LA. GEN. STAT. (Dart., 1932) §8582; Okla. Laws 1933, art. 7, §2; Mo. Laws 1929, 103; WASH. REV. STAT. (Rem., 1933) §11202-b.

[37] MISS. CODE (1930) c. 125. The Mississippi estate tax was adopted in 1924 and the rates were changed in 1928 to equal eighty per cent of the federal rates. N. Y. CONSOL. LAWS (Cahill, 1930) c. 61, art. 10-C; *id.* 1931, 1932, 1933 Supp. The New York rates were increased in 1933 and are now more than eighty per cent of the federal rates. REPORT N. Y. STATE TAX COMMISSION (1930) 17; *id.* (1931) 17; *id.* (1932) 20; *id.* (1933) 63.

[38] *Supra* note 36.

estate of which this property within the state would be a part, and then taking eighty per cent of that proportion of the federal tax which the local estate bears to the entire estate wherever situated. The Texas statute,[38] and a 1932 amendment to the Massachusetts statute,[39] seem to reach this result. New York's statute is directed to a similar result, except that it excludes from the entire estate real property situated in another state and personal property having a situs in another state.[40] It is difficult to see the reason for excluding such property, since the tax is not imposed on that property, but it is merely a factor used in determining the tax to apply to the local estate.

Under statutes which impose the additional estate tax on only the estates of residents, how could the state wherein is located real property or tangible personalty belonging to a non-resident subject the transfer of such property to the maximum tax? And certainly this property does not pay the maximum tax, or any tax, to the domiciliary state. It would appear, however, that, under statutes taxing estates of residents only, the domiciliary state would, according to the terms of the statutes, get this additional tax due to be paid by property beyond its jurisdiction,—not of course, as a tax on the transfer of of that property, but by increasing the tax on the local estate of the resident decedent. This would be brought about by the provision in such statutes that the amount of the additional tax due from the estates of residents shall be the amount by which eighty per cent of the federal tax shall exceed the aggregate of death taxes paid to the states in respect to any property owned by the decedent.[41] Since

[39] Mass. Acts 1932, c. 284. "A tax is hereby imposed upon the transfer of real property or tangible personal property in the commonwealth of every person who at the time of death was not a resident of the commonwealth, the amount of which shall be a sum equal to such proportion of the amount by which the credit allowable under the applicable federal revenue act for estate, inheritance, legacy and succession taxes actually paid to the several states exceeds the amount actually so paid for such taxes, exclusive of estate taxes based upon the difference between such credit and other estate taxes and inheritance, legacy and succession taxes, as the value of the property taxable in the commonwealth bears to the value of the entire estate." The Massachusetts statutes of 1926 and 1927 applied only to estates of resident decedents. Mass. Acts. 1926, c. 355; *id.* 1927, c. 178.

[40] N. Y. CONSOL. LAWS (Cahill, 1930) c. 61, §249-6. "A tax is hereby imposed upon the transfer of so much of the net estate of every person dying on or after the effective date of this article, who, at the time of death was a non-resident of this state, as consists of real property situated and tangible personal property having an actual situs in this state. The amount of the tax on such real and tangible personal property shall be determined as follows: Ascertain the amount of tax which would be payable under this article if the decedent had died a resident of this state with all his property (except real property situated and tangible personal property having an actual situs outside this state) situated or located within this state, and multiply the net tax so ascertained by a fraction the denominator of which shall be the value of the gross estate as ascertained for the purpose of computing such tax and the numerator of which shall be said gross estate value of the real property situated and the tangible personal property having an actual situs in this state. The product shall be the amount of tax payable to this state."

[41] See, for example, the Connecticut statute, *supra* note 34.

other states having similar statutes imposing the additional tax on estates of residents only would not exact an additional tax from the transfer of the local property of a non-resident, this would increase the amount to be exacted by the domiciliary state. If that is the result it is undesirable.[42] The state where the property is located should amend its law to take advantage of the credit whether the property belongs to resident or non-resident decedents. The state of domicile should not be left to reap a disproportionate share of the federal credit.

In addition to the failure of some statutes to apply the additional estate tax to the local estates of non-residents, which prevents these states from taking advantage of the credit held out to that property, there are twelve states which appear to have taken no action designed to absorb the credit with respect to the estates, either of residents or non-residents.[43] The existing inheritance tax rates in some of these states are sufficient to absorb the credit, except in cases in which very large shares go to direct heirs. But in others the rates are low; the graduation ceases early; and the states would fully benefit from the credit only in the cases of smaller shares.[44]

Suppose that the federal credit were repealed, or increased, or reduced, what would be the effect on the estate taxes of the states? Again the statutes show considerable diversity. In Michigan it is provided that the additional estate tax shall not be affected by change or repeal of the federal statute.[45] Mississippi's estate tax is to continue so long as the federal estate tax exists, but is not dependent on the credit clause.[46] The New York estate tax is independent of the federal tax or the credit provision.[47] A few states have designed their statutes to accommodate their estate taxes to possible changes in the amount of the federal credit, the declared object being to receive whatever largess the federal authority might bestow.[48] But these adjustments

[42] This may not be the administrative application of the statutes, but it would seem to be their literal interpretation. Whether the statutes if so interpreted to increase the tax on the local estate would be constitutional, see Frick v. Pennsylvania, 268 U. S. 473, 45 Sup. Ct. 603, 69 L. ed. 1058 (1925); also see Maxwell v. Bugbee, 250 U. S. 525, 40 Sup. Ct. 2, 63 L. ed. 1124 (1919).

[43] Such seems to be the case in: Ariz., Ark., Idaho, Ill., Nev., N. M., Ore., S. C., S. D., Utah, Wyo.

[44] Report of S. C. Tax Commission (1934) 6: "Twice previously we have recommended that legislation be enacted which will levy an estate tax of sufficient amount to take up the full credit under the federal estate tax law. . . . The enactment of such law will in no case increase the total tax payable by an estate but would reduce the federal tax and increase the state tax."

[45] Mich. Acts 1929, no. 237.

[46] Miss. Code (1930) §5073.

[47] N. Y. Consol. Stat. (Cahill, 1930) c. 61, art. 10-c.

[48] Connecticut: "It is the intent and purpose of this chapter to obtain for this state the benefit of the credit allowed under the provisions of sec. 301, subsec. (b), of the federal revenue act of 1926, and any modifications thereof later made. The provisions of this chapter shall be interpreted and construed liberally in order to accomplish the purpose thereof. . . . This chapter shall become void

relate only to increases or reductions, and, if the credit were repealed, their estate taxes would fall. There is a larger group of statutes in which it is not clear what the effect of change or repeal would be, but with the chances more on the side of unadaptability.[49] Another type of statute provides that the additional estate tax shall become void with the repeal of the eighty per cent credit, and nothing is said regarding possible increases or decreases.[50] However, the imposition of the tax is tied to the eighty per cent figure, it being stipulated that the tax should be the amount by which eighty per cent of the federal tax exceeds death taxes paid to the states. One thing is clear, that a number of states have cast their statutes in an inelastic form, and that change in the credit would necessitate new legislation by the states. When in 1932 Congress desired to raise more revenue for the federal government from estates, its action took the form of an additional estate tax, and the estate tax and credit provision of the 1926 act were left undisturbed.[51]

What has been the attitude of the states toward the federal credit? Most of them have sought to obtain its benefits, but how have they reacted to the idea? It is written into the Nebraska statute that, "This act is not a commitment of the legislature to the principle of the coercive features of the Federal Estate Tax. It is accepted in order to protect the temporary interests of the people of the State of Ne-

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and of no effect in respect to the estates of persons who die subsequent to the effective date of the repeal of the federal tax or of the provision thereof providing for a credit of the tax paid to the several states and territories of the United States. This chapter shall likewise become void and of no effect in respect to the estates of persons who die subsequent to the effective date of any judgment of the Supreme Court of the United States declaring said federal estate tax or said credit unconstitutional and void. If said credit in said federal revenue act shall be changed by the action of Congress to less or more than eighty per centum, the tax imposed by the provisions of this chapter shall be so assessed as may be necessary to absorb the full amount of such changed credit." Conn. Acts 1931, c. 77a. See Mass. Acts 1927, c. 178; FLA. COMP. LAWS (Supp. 1934) §1342(2); NEB. COMP. STAT. (1929) c. 77, §2303; Colo. Laws 1933, c. 106, §4; PA. STAT. ANN. (Purdon, 1931) tit. 72, §2303; TENN. CODE (1932) §1304; MD. CODE (Bagby, Supp. 1929) art. 62-A; Del. Laws 1933, c. 8; W. Va. Acts 1933 c. 36; Ind. Acts 1931, c. 75, §38; Mont. Laws Ex. Sess. 1933-34, c. 48 §3a; VA. CODE ANN. (Michie, 1930) Tax Code, §115.

[49] Col. Stat. 1927, c. 646, §2 3/4; Iowa Acts 1929, c. 204, §11; KAN. REV. STAT. (Supp. 1933) c. 79, §1501a; LA. GEN. STAT. (Dart., 1932) §8582; Mo. Laws 1927, 100; *id.* 1929, 103; N. C. CODE ANN. (Michie, Supp. 1933) §7880 (6); Ohio Laws 1927, 421; Okla. Laws 1933, art. 7; R. I. Acts 1929, 185; Tex. Gen. Laws 1933, c. 192, §2b; WASH. REV. STAT. (Rem., 1933) §11202-b; W. Va. Acts 1933, c. 36 §28.

[50] Me. Laws 1933, c. 148, §39; IOWA CODE (1931) c. 351-C1; Minn. Laws 1931, c. 322, §3; N. H. Laws 1931, c. 72 A, §9; Vt. Acts 1927, no. 23, §3; WIS. STAT. (1931) §72.58.

[51] 47 STAT. 243 (1932); 48 STAT. 754 (1934); 26 U. S. S. A. §1092-a; *id.* §1093-a provides, "The credit provided in section 1093 of this chapter (80 per centum credit), shall not be allowed in respect of such additional tax." *Hearings on Revenue Revision, 1932, Committee on Ways and Means,* 7, 43.

braska."[52] There was in 1927 a determined campaign for the repeal of the federal estate tax.[53] The legislatures of nineteen states passed resolutions deploring the encroachment upon "the rights of the states to raise their own revenue as the wisdom of their legislatures direct," and requesting the immediate repeal of the federal tax, leaving the states to use this form of taxation to whatever extent they chose.[54] It is difficult to evaluate these letters from the states to their Congressmen. Certainly they did not represent the spontaneous expression of state legislatures acting independently. The movement for repeal was nationally organized and financed, and a part of this movement was the adoption of these memorials to Congress.[55] Paint a picture of federal invasion of states' rights and a state legislature is generally willing to protest, though it may at the same session request increased federal aid. But not all of the states which had the resolution before them acted favorably. In New Hampshire the resolution was voted down; in Montana a substitute was adopted requesting that Congress not repeal the estate tax; and in Iowa, while the senate voted for the resolution, the house requested that the federal statute be retained.[56]

[52] NEB. COMP. STAT. (1929) c. 77, §2307.

[53] *Hearings on Revenue Revision* (1927-28) *Committee on Ways and Means,* 580-826.

[54] A representative type of resolution is that passed in Indiana: "Whereas, The federal estate tax law, as amended February 26, 1926, provides that the estate liable thereunder shall be credited with any inheritance tax paid by its beneficiaries to the state or states, the credit not to exceed eighty per cent of the federal levy; and, Whereas, This amendment menaces the rights of the states, because its object is to persuade them to abandon their state inheritance tax laws in favor of statutes based on the federal law, and the tax not being required for revenue at this time, its only object now must be coercion of the states; and, Whereas, The joint levy is contrary to the theory of this government, unprecedented, and offensive to the independence of the legislatures of the sovereign states; Therefore, Be it resolved by the Senate, the House of Representatives concurring, that we hereby request the present Congress to repeal immediately the federal estate tax provisions of the revenue law effective February 26, 1926, and abandon this field of taxation in time of peace." Ind. Acts 1927, c. 260. See Ala. Gen. Acts 1927, 21; Ariz. Laws 1927, 473; Colo. Laws 1927, 773; Del. Laws 1927, 637; Nev. Stat. 1926-27, 342; N. D. Laws 1927, 482; Pa. Laws 1927, 1025; R. I. Acts 1927, 494; Tex. Laws 1927, 473; Utah Laws 1927, 176; W. Va. Acts 1927, 348; Wash. Laws 1927, 932; Wyo. Laws 1927, 224; and see *Hearings op. cit. supra* note 53, at 580-826, references to resolutions of Connecticut, Maryland, Michigan, Missouri and Oregon.

[55] The type of this organization and its financial backing is depicted in *Hearings, op. cit. supra* note 53, at 580-826.

[56] *Hearings, op. cit. supra* note 53, at 623, 639, 640. The New Hampshire House approved a committee recommendation that the resolution not be adopted. The Iowa Senate voted for repeal by a majority of one, while the House voted 92 to 8 against repeal. The Montana resolution read in part: "Whereas, There has been, and now is, considerable propaganda being disseminated to influence the repeal of the federal estate tax upon the grounds that it was originally passed as a war measure and interferes with the full freedom of the states to impose succession taxes; and Whereas, We do not agree with the reasons or purposes urged for the abolishment of this source of revenue, but on the contrary, firmly believe. . . . (5) That if the federal estate tax is ever repealed the states which are

Although the legislature of Florida resolved in 1927 that "the State of Florida declines to be coerced into repealing the constitutional provision forbidding the levying of taxes upon the estates of dead men, but avows its intention of forever maintaining and continuing the constitutional amendment,"[57] nevertheless the next legislature submitted an amendment to the constitution authorizing death taxes to the extent of the credit, and this was adopted in 1930.[58] In 1931 the Alabama constitution was similarly amended.[59] Since both the Florida and Alabama amendments permit the levying of inheritance and estate taxes only to the extent necessary to absorb the credit, repeal of the federal tax or the credit clause would nullify this power. Nevada remains today the only state without death taxes.[60]

To the extent that the credit device was intended to enable the states to utilize more fully this field of taxation it has succeeded. For the states have increased their revenue from inheritance and estate taxes[61] without fear that the wealthy might seek other homes, and this has been made possible by the federal statute. But whence comes the power of the federal government to effect this change? Protests against coercion and invasion of the rights of the states received discouraging treatment in *Florida v. Mellon.*[62] The State of Florida sought to file a bill enjoining the Secretary of the Treasury from collecting the federal estate tax in Florida. It was alleged that under her constitution

not earnestly and honestly in favor of an inheritance tax may immediately repeal their laws as an invitation and inducement to the wealthy to take refuge within their borders and the innocent states may be compelled in self-defense to abandon this source of revenue . . . and the extra burden will be shifted proportionately to those who are less able to pay. . . . This we believe to be the real purpose and object of this propaganda. . . ." Mont. Laws 1927, 598.

[57] *Hearings, op. cit. supra* note 53, at 583.

[58] FLA. COMP. LAWS (Supp. 1934) const. art. IX, §11. The amendment added to the provision set out in note 2 *supra* the following: "Provided, however, that the legislature may provide for the assessment, levying and collection of a tax upon inheritances or for the levying of estate taxes not exceeding in the aggregate the amounts which may by any law of the United States be allowed to be credited against or deducted from any similar tax upon inheritances, or taxes or estates assessed or levied by the United States on the same subject but the power of the legislature to levy such inheritance taxes or estate taxes in this state shall exist only so long as, and during the time a similar tax is enforced by the United States against Florida inheritances or estates and shall only be exercised or enforced to the extent of absorbing the amount of any deduction or credit which may be permitted by the laws of the United States, now existing or hereafter enacted to be claimed by reason thereof, as a deduction or credit against such similar tax of the United States applicable to Florida inheritances or estates."

[59] ALA. CODE ANN. (Michie, Supp. 1932), amendment XVI. The Alabama amendment is similar to the Florida amendment, *supra* note 58.

[60] It is reported that the Governor of Nevada has proposed that Nevada enact death taxes to take up the federal credit. Manning, *Governor's Recommendations on Taxation* (1935) 20 BULL. NAT. TAX ASS'N. 136, 138.

[61] FEDERAL AND STATE DEATH TAXES, REPORT TO JOINT COMMITTEE ON INTERNAL REVENUE TAXATION (1933) 238.

[62] 273 U. S. 12, 47 Sup. Ct. 265, 71 L. ed. 511 (1927).

Florida could not impose an inheritance tax and consequently could not take advantage of the federal credit; that taxpayers would be induced to withdraw property from Florida, thereby diminishing the taxable wealth of the state; that the state was directly interested also in protecting her citizens against the unlawful discriminations effected by the credit; that the estate tax with the credit provision was an invasion of the rights of the state, intended to coerce the adoption of an inheritance tax and penalizing the state for failure. The United States Supreme Court denied Florida permission to file the bill, holding that the Court was without jurisdiction to sustain the suit since the state had not suffered, nor was in immediate danger of suffering, any direct injury as a result of enforcing the federal statute,—the anticipated result in the withdrawal of property was considered remote and speculative. Nor could Florida sue to prevent injury to her citizens since in their relations with the federal government it was for the United States, and not Florida, to represent them as *parens patriae*. Mr. Justice Sutherland, who wrote the opinion for a unanimous bench, briefly disposed of the contention that the statute interfered with the taxing power of the state by inducing the removal of property, and proceeded to give an opinion on the validity of the tax under the uniformity clause. The tax was not without uniformity because other states imposed inheritance taxes while Florida did not. "Congress," he said, "cannot accommodate its legislation to the conflicting or dissimilar laws of the several states nor control the diverse conditions to be found in the various states which necessarily work unlike results from the enforcement of the same tax. All that the Constitution (Art. I, sec. 8, cl. I) requires is that the law shall be uniform in the sense that by its provisions the rule of liability shall be the same in all parts of the United States." Mr. Justice Sutherland did not address himself to the contention that the statute was an effort to coerce the state into enacting legislation to the liking of Congress and to penalize it if it failed to do so.

Although the decision in *Florida v. Mellon* would seem to be only that the Court did not have jurisdiction to entertain a bill for an injunction by the State of Florida, yet the attitude manifested by the language of the opinion does not encourage further litigation.[63] Surely a taxpayer would travel a hazardous road contesting the tax. But suppose that a litigious Nevadan should pay the federal estate tax under protest and sue to recover, contending, (a) that the tax was not uniform throughout the United States,[64] and (b) that the tax violated the re-

[63] See Machen, *The Strange Case of Florida v. Mellon* (1928) 13 CORN. L. Q. 351.

[64] U. S. CONST., Art. I, §8, cl. 1: "The congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the com-

served rights of the states,[65] in that it was an effort to coerce and had the effect of coercing state tax legislation. He might ask the Court to reconsider its observations on uniformity enunciated in *Florida v. Mellon*. It seems exceedingly doubtful that the Court would change its view on this. Without looking at the credit clause, one sees that the statute impose the same tax and at the same rate throughout the United States. Also the same credit is available in every state. If an estate in Nevada pays a higher tax to the federal government than an estate in North Carolina it is not because of a dissimilar tax imposed or a dissimilar credit available under the federal law. The Nevadan might ask the Court to declare the credit clause invalid as an effort on the part of Congress to compel the states in a matter left to their discretion by the Constitution. The credit clause may not on its face show federal dictation, but, whether one chooses the word "coerce" or "induce," anyone who reads the record knows that the credit was intended to force state action. It is the sort of problem in which the Court, if it chose, could write a convincing opinion about looking through form to substance and hold that the tax is in reality not uniform and that the Constitution never intended for Congress thus to determine state tax policy. *Florida v. Mellon*, ten years of state adjustment to the credit, and the imperative need of a force to prevent state tax competition are the credit's strongest constitutional supports.

The credit has been a useful governmental device in the preservation of inheritance taxation through a period of clamor for federal repeal and threatened competitive reduction of state rates. But what other results have been obtained? It was the desire of the National Committee on Inheritance Taxation that Congress provide in 1926 for the repeal of the federal tax to be effective six years thence. The hope was that uniformity in state death taxation might be achieved in that time. The attitude of wait-and-see which prevailed over the proposal has proved the better. Most of the states have retained their inheritance tax statutes with all their variations in rates and exemptions. There has been no uniformity produced in that direction. Nor has there even been uniform action in taking advantage of the credit. What has been achieved is a degree of uniformity in the amount of taxes which the larger estates will pay whether situated in one state or another. This does not apply to the smaller estates in many cases where state rates exceed eighty per cent of the federal, and neither does it apply univer-

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mon defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

[65] U. S. CONST., Amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people."

sally to the larger estates, since in some states the rates are higher than the federal credit. It means only that for the larger estates, and it is with regard to these that competitive advantages produce trouble, the tax burden will be the same in many states.

There have been suggestions that the use of the credit might be extended to personal and corporate income taxes.[66] The advantage would be the elimination to some extent of competition in these fields of taxation. That it would be extremely difficult to determine the type of personal taxes and the type of corporate taxes which should be allowed as a credit against the federal tax, has been demonstrated by recent studies.[67] Different states impose taxes different in legal nature but alike in economic incidence. It would be hard for Congress satisfactorily to define the limits of the credit.

[66] A resolution adopted by the Second Interstate Assembly, held in Washington, D. C., Feb. 28-March 2, 1935, provides: (1) That the Second Interstate Assembly recommends federal enactment of legislation allowing a credit against the federal individual income tax for state individual income taxes and other state and local taxes of a personal nature paid or accrued: (2) That a graduated plan be used to allow a substantial credit for lower incomes and a smaller credit for larger incomes, for example, about 75 per cent of the aggregate of the credits for taxes on incomes below $10,000 and 25 per cent on incomes above $10,000. The percentage selected should provide a total credit of approximately $150,000,000. (3) That the additional federal revenue to replace the federal credits allowed to taxpayers for state taxes be secured by some one or more of the following means: a. inclusion of dividend income in the federal tax base as completely as other income; b. amendment of federal and state constitutions to permit the taxation of income from tax-exempt securities and of salaries of officials and employees of the federal, state, and local governments; c. reduction of personal exemptions, including elimination of the earned income credit; d. allowance of personal exemptions and credits for dependents in terms of tax. 8 STATE GOV'T., No. 4 (1935).

See, THE PERSONAL INCOME TAX AND THE CREDITING DEVICE, RESEARCH REPORT FOR INTERSTATE COMMISSION ON CONFLICTING TAXATION (1935); THE CORPORATION INCOME TAX AND THE CREDITING DEVICE, RESEARCH REPORT FOR INTERSTATE COMMISSION ON CONFLICTING TAXATION (1935); Edmunds, *Extension of Rebate of Federal Taxes to the States* (1933) 11 TAX MAGAZINE 92; Seligman, *The Fiscal Outlook and the Coördination of Public Revenues,* CURRENT PROBLEMS IN PUBLIC FINANCE (1933) 261.

In the consideration of the credit clause for the estate tax Congressman Ramseyer suggested for the estate tax credit a series of graduations similar to the graduations recently recommended by the Interstate Assembly. In the course of debate Mr. Ramseyer was pointing out that fortunes are national in character: "Take Henry Ford, for instance. The whole United States has contributed, and contributes daily, to his fortune. If he should die, say worth $500,000,000, under the proposed bill before us, speaking in round numbers his estate would pay an estate tax of $100,000,000. With an 80 per cent credit Michigan would get $80,000,000 and the federal government $20,000,000. Now the people of Michigan have not contributed to that fortune any more than the number of their population bears to the population of the entire United States. In that case, in fairness to all concerned, the credit should be reversed. I have thought of a three-bracket arrangement. That is to say, a bracket up to $500,000 giving the state a credit of 75 per cent; then a bracket from $500,000 to $2,000,000 or $3,000,000, giving a credit to the state of 50 per cent; and another bracket for that portion of the estate over $3,000,000, giving the state a credit of 25 per cent." 67 CONG. REC. 708, 965 (1925).

[67] The research reports in note 66 *supra.*

An objection to the extension of the credit idea is that what we need in this country is a distribution of revenue—or expenditure of revenue—on the basis of governmental need, and that Congress should act to this end and not devote its efforts to the preservation of sectional inequalities in available revenue. As the states took advantage of the credit the federal revenue from the estate tax declined and correspondingly the state receipts increased. Naturally the larger share of this increase went to the more wealthy states.[68] This result illustrates a defect in the crediting principle,—certainly from the viewpoint of the poorer states, and, it is believed, from the viewpoint of the national interest. The credit benefits the states in proportion to their collections for the federal treasury. The larger estates today are built up through nation-wide commercial activity and represent contributions from Nebraska as well as New York, yet when the federal government relinquishes the estate tax in favor of the states, New York and not Nebraska stands to benefit.[69] But whether or not one section contributes less or more than another, it is in the national interest that all sections of our population enjoy a high level of governmental service. The schools, the courts, the roads, the free medical and legal facilities, should be of the same high standard throughout the country. It might be that Congress would retain the present amount of personal and corporate income tax collections and provide increased rates to take care of the credit for state taxes, and so it would not be relinquishing funds to fall among the states as the chances of jurisdiction dictate. But the objection goes deeper and questions whether the funds to be derived from these increased rates should not also be distributed on the basis of need.

[68] *Supra* note 61.

[69] Senator La Follette: " . . . the copper mines of Michigan, Montana, and Arizona have yielded enormous fortunes but the owners of these fortunes as a rule do not live in the states where their wealth is produced. Michigan copper pours its dividends into Massachusetts. A southern Senator told me the other day of an instance where in his own state much of the property of one of the great public utilities is owned in a northern state. Arizona and Montana copper mines pour their wealth into the coffers of the New York magnates. The only way by which these and other states can reap the benefit from wealth that has been taken from their borders and concentrated in the great cities of the east is to permit the federal government to levy a heavy tax upon these great fortunes through an estate tax and use the proceeds for the development of roads and other needed public improvements in those states." 67 CONG. REC. 3681 (1926).